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No. 81-130

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

WESTERN MINING COUNCIL, et al.,

Petitioners,

v.

JAMES G. WATT, Secretary of the Interior of the United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
In Case No. 78-2669

PETITIONERS' RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO REVIEW ON CERTIORARI

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STATEMENT

The Court of Appeals affirmed the decision of the Magistrate approved by the District Court, dismissing plaintiffs' complaint for alleged failure to state a claim. The reason for dismissing the complaint was plaintiffs' alleged lack of standing to challenge the constitutionality of sections

of the Federal Land Policy and Management Act of 1976, (FLPMA), because plaintiffs had not as yet suffered or been threatened with prosecution, imprisonment, arrest without warrant, or search and seizure without warrant under Section 303 (a),(c) of the Act, 43 USC 1733.

Plaintiff mining claimants alleged that the defendant "is engaged in the enforcement through the agency of the Bureau of Land Management of the provisions of the Act of October 21, 1976 [FLPMA]" Complaint A-3, Paragraph 8.

We cannot agree with respondent's Statement of the Case. The Court should not be misled by the substitution of "possible" for "practical" on page 4 of the respondent's Brief. The statute states:

> "Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical." §310, 43 USC 1740 (emphasis added.)

Nor should the Court be misled by the statement at p. 7 of respondent's brief:

> "...it was not even alleged that regulations had been drafted or proposed, and obviously therefore, both their applicability to petitioners and their content were unknown."

This mistakes the issue, for the challenge is not directed against the regulations but against vagueness in the statutory grant of power. The existing regulations, promulgated without authorization in 1974, and authorized in 1976 "to the extent practical" by FLPMA, are well known. See Stanley Dempsey, "Forest Service Regulations Concerning the Effect of Mining Operations on Surface Resources", Natural Resources Lawyer Vol. VIII No. 3, Journal of the Section of Natural Resources Law, American Bar Association. Defendant's proposed regulations for "Surface Management of Public Land Under U.S. Mining Laws", published in the Federal Register, Vol. 41 No. 235, Dec. 6, 1976, before the complaint was filed, are well known.

We do not agree that petitioners alleged only conclusions of law. We agree that facts alleged in the complaint must be taken as true. See Complaint A-2 to 10.

We do agree with respondent's statement of petitioners' position: "the [Secretary] or his delegates have a free hand to make criminal any activity which [he or his subdelegates] may choose to deem 'unnecessary or undue degradation of the lands' and the Act makes such activity a crime "before [he] or his delegates have even described it." App. A-7; Resp. Br. p. 4.

And we agree with respondent's statement of petitioners' position "that certain provisions of FLPMA altered "contracts" they had made with the government pursuant to the mining law of 1872." "By adding additional conditions, the petitioners contended, the contracts were altered, in violation of the "Due Process Clause." Resp. Br. p. 5.

The last sentence of Section 302 (b), 43 USC 1732 amends the Mining Law of 1872 and impairs the rights of locators by providing: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." It grants to the Secretary unlimited power in his absolute discretion to permit or deny their vested rights to owners of mining claims retroactively. It takes from plaintiff mining claim owners their right to mine vested under the mining law and grants to the Secretary power to repeal the mining law of 1872 by administrative action.

No definition or guideline in the statute limits the authority which the Secretary or his subdelegates in the field are given to act to prevent whatever may in their eyes be "unnecessary degradation" of lands. The vagueness of the authority granted by FLPMA created an immediate need

for declaratory judgment when enactment of FLPMA transformed the miners' statutory right to use, occupy and develop public lands into an uncertain privilege, dependent upon the unguided authority given to administrative personnel to declare a mining operation "unnecessary degradation of the lands" and to take action on the spot to enforce their orders by criminal sanctions under Section 303 (43 USC 1733).

Contrary to respondent's argument, dismissal of plaintiffs' complaint for lack of standing is in direct conflict with Doe v. Bolton, 410 U.S. 179 (1973), a recent pronouncement of this Court which should be followed here over the earlier cases urged by the respondent. In Bolton, although the target group (physicians) had not been prosecuted or threatened with prosecution, they had standing to challenge the constitutionality of an anti-abortion statute. Similarly, in Epperson v. Arkansas, 393 U.S.

97 (1968), the plaintiff was not required to risk prosecution before challenging an anti-evolution statute.

The present case meets the test for availability of declaratory judgment stated in Diamond Shamrock Corp. v. Lumbermen's Mutual Cas. Co., 416 F2d 707 (CA Ill. 1969). There is reasonable apprehension of liability. It meets the test of ripeness, for enactment of FLPMA confronted the miners at once with a drastic change in the status of their occupation. Subjection of the miners' right to work their claims to dictation by agency personnel impaired plaintiffs' property rights in mining claims which they were working to obtain full ownership under the terms held out by the mining law. A pre-enforcement challenge is appropriate here under the doctrine of Abbot Laboratories v. Gardner, 387 US 136 (1967), for the Act requires an immediate and significant change in the conduct of plaintiffs' affairs with serious penalties attached to noncompliance.

This case presents a justiciable controversy of sufficient immediacy and reality between the adverse interests of the Secretary, charged with enforcement of FLPMA and the plaintiffs. This Court held in Tennessee Power Co. v. TVA, 306 U.S. 118, that a "case of actual controversy"which makes appropriate a court's declaration of the "rights and other legal relations of any interested party seeking such declaration" is present when the plaintiff alleges injury to "a legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Id. at 137-138.

The amendment of the mining law made by FLPMA impairs retroactively the right previously granted to plaintiffs by the sovereign to extract minerals, which is a part of the contract between plaintiffs and the sovereign arising under 30 USC §§ 22, 26, 35, and 612, set out in the Petition

pp. 8-10.

The vested property interest of the locator of a mining claim has been recognized by this Court many times. See Belk v. Meagher,104 U.S. 279; Noyes v. Mantle, 127 U.S. at 351; Manuel v. Wulff, 152 U.S. 505, 510-511; Elder v. Wood, 208 U.S. 226; Bradford v. Morrison, 212 U.S. 389; Wilbur v. Krushnic, 280 U.S. 306; Union Oil Co. of California v. Smith, 249 U.S. 337, 348-349; Cole v. Ralph, 252 U.S. 286.

Rights arising out of contract are protected by the Fifth Amendment. Lynch v. United States,292 U.S. 571, 579 (1934). FLPMA substitutes permission from the Secretary or his subdelegates, without whose acquiescence mining may no longer disturb the surface of plaintiffs' mining claims, in place of the vested, statutory right to mine previously granted by the sovereign. This impairment of vested rights created a justiciable controversy suitable for declaratory judgment.

CONCLUSION

Grant of review under a writ of certiorari would uphold the usefulness of the Declaratory Judgments Act, 28 USC §2201 for the settlement of controversies before they ripen into violations of law or a breach of duty. The constitutionality of the challenged provisions of FLPMA should be decided on the merits to avoid burdening the courts with a multitude of cases which otherwise are certain to arise. Therefore, petitioners respectfully urge that a writ of certiorari be granted.

October 27, 1981.

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